

Procedures

What procedures could be created by statute to address either government competition or privatization?

Prepared for the Government Competition and Privatization Subcommittee
by the Office of Legislative Research and General Counsel (July 2007)

Today's Discussion

Examples

Legal and policy issues

Utah Examples

Most relate to a specific function
4 types

- Board/Commission

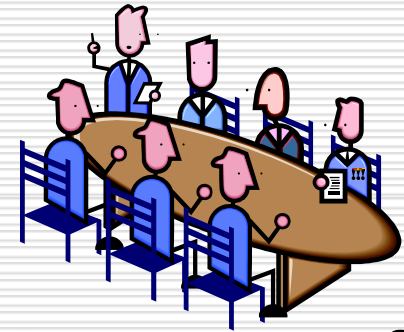
- Correctional Functions

- Prohibitions/Obligations

- Petition Process

UT 1: Board/Commission

- ❑ Current mixed member board (PPB)
- ❑ Arguably advisory
 - Limits on power over local governments
 - No express authority to require action if unfair competition found
 - Unclear whether agencies are required to have PPB review privatization
 - PPB primarily is a “sounding board”



UT 1: Board/Commission

- ❑ New or revised board/commission
- ❑ Membership questions
- ❑ Powers
 - Scope includes political subdivisions and higher education



Higher education had
unique provisions in
some versions

Example of a statement of general principle:
"It is the general policy of the state that a government agency shall not start or carry on any commercial activity to provide goods or services for its own use, the use of other government agencies, or for public use if such goods or services can be procured from private enterprise through ordinary business channels."

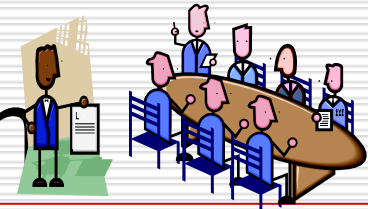
□ Powers

- Scope includes political subdivisions and higher ed
- Statement of principles/ex
- Complaint process

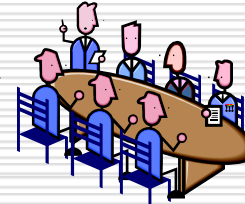
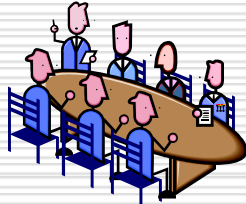
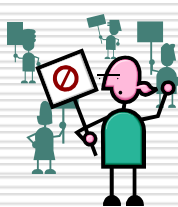
"Commercial activity" means performing services or providing goods which can normally be obtained from private enterprise."

What if not a
competitive market?

UT 1: Board/Commission



A proposed process



- File complaint w/commission & agency

- Next meeting
- "Good faith"?
- Notify parties
- Require agency to respond

Respond
in writing
30 days

Admit
Deny
60 days

Appropriate
remedial
action/timely basis

Public
Hearing

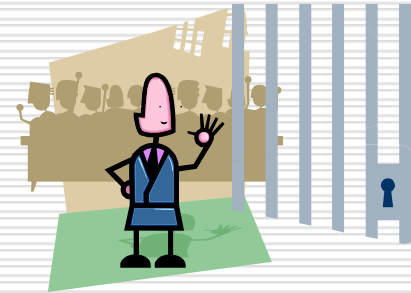
- Issue report in 30 days
- If for agency, complainant may be required to pay costs $\leq \$1,000$
- If for complainant, agency to terminate activity and contract w/private sector

3 months

Injunction

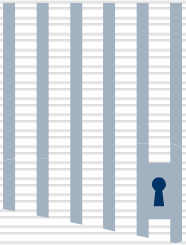
UT 2: Correctional Functions

- Division of Correctional Industries
 - “self-supporting” “profit-oriented”
“generates revenue”
- Department of Corrections
 - Provide an opportunity for persons affected by a new industry program or product line to **testify**
 - May not establish a new enterprise of gross annual sales > than \$100,000 without **hearing**
 - Consider effect of an enterprise on Utah industry
 - May not approve if “comprehensive and substantial adverse impact on a particular Utah business, enterprise, or industry”



UT 2: Correctional Functions

- Procurement exceptions/issues, related to correctional industries:
 - A school district may purchase computers or computer services
 - A public procurement unit shall purchase
 - A political subdivision may purchase and is encouraged to do so when feasible
 - State may not purchase from any other source unless in writing the director and the state procurement officer or institutional procurement officer find that purchase is not feasible due to a statutorily described circumstance



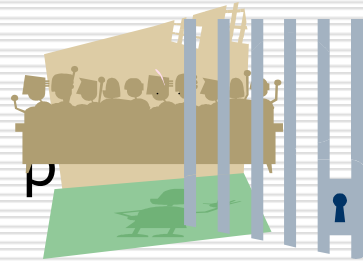
UT 2: Correctiona

In Practice

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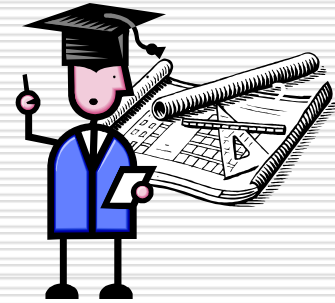
UT 2: Correctional Functions

- Private contracts related to facilities:
 - Finance, acquire, construct, lease, or full or partial correction services
 - **Public hearing** within county or municipality where facility is to be located
 - Consider input from hearing in making decisions
 - Receive **written notice** that the legislative body of the county or municipality **agrees** to the establishment of the facility
 - Require show statutorily specified qualifications



UT 3: Prohibitions/Obligations

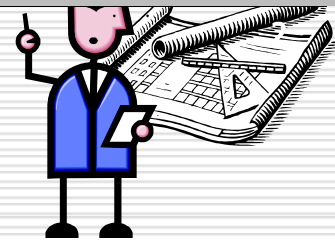
- If a government entity obtains architect or engineering services by competitive procurement process and notifies the public of the process:
 - a higher education entity, or any part of one, **may not submit a proposal**
 - the government entity **may not award a contract** to a higher education entity, or any part of one



UT 3: Prohibitions

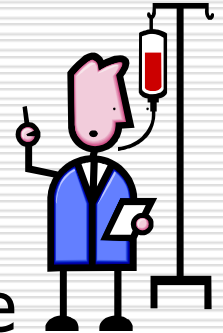
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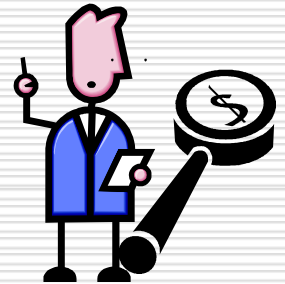
UT 3: Prohibitions/Obligations

- Department of Health shall establish and operate programs necessary or desirable for the promotion or protection of the public health and the control of disease or which may be necessary to ameliorate the major causes of injury, sickness, death, and disability in the state, except that the **programs shall not be established if adequate programs exist in the private sector**



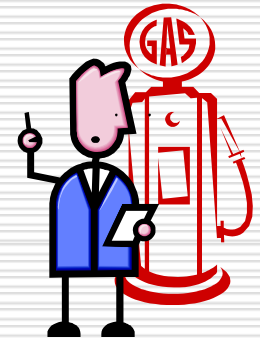
UT 3: Prohibitions/Obligations

- A **market analysis shall be conducted** periodically of fees and rates for certain services in the Department of Administrative Services, including a comparison of the fees and rates with the fees and rates of other public or private sector providers where comparable services and rates are reasonably available



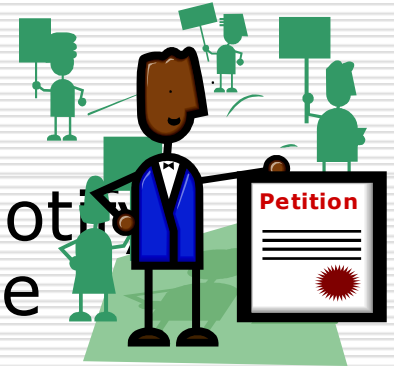
UT 3: Prohibitions/Obligations

- Operate a fuel dispensing services program in a manner that where practicable, **privatizes** portions of the state's fuel dispensing system



UT 4: Petition Process

- The governing authority of a political subdivision considering entering into a privatization project agreement (drinking water, water, or wastewater project) shall notify the public, give information on the agreement, and described how a **petition may be filed** requesting an election to determine whether the agreement should be approved



UT 4: Petition Process

- The governing authority of a political subdivision considering entering into a privatization project

Privatization and water issues appear to occur frequently in other states

agreement, and described how a **petition may be filed** requesting an election to determine whether the agreement should be approved

Examples From Other States

≠ Specific areas, *e.g.*:

corrections

higher education

local government

≠ Procurement rules

Focus general procedures in statute

Three types

≠ Administrative rules

Require review

Direct action

Respond to complaints

PROBE

Indiana is an example of a governor-driven effort as part of budget process (conducted in conjunction with legislative intent)

Other 1: Require Review

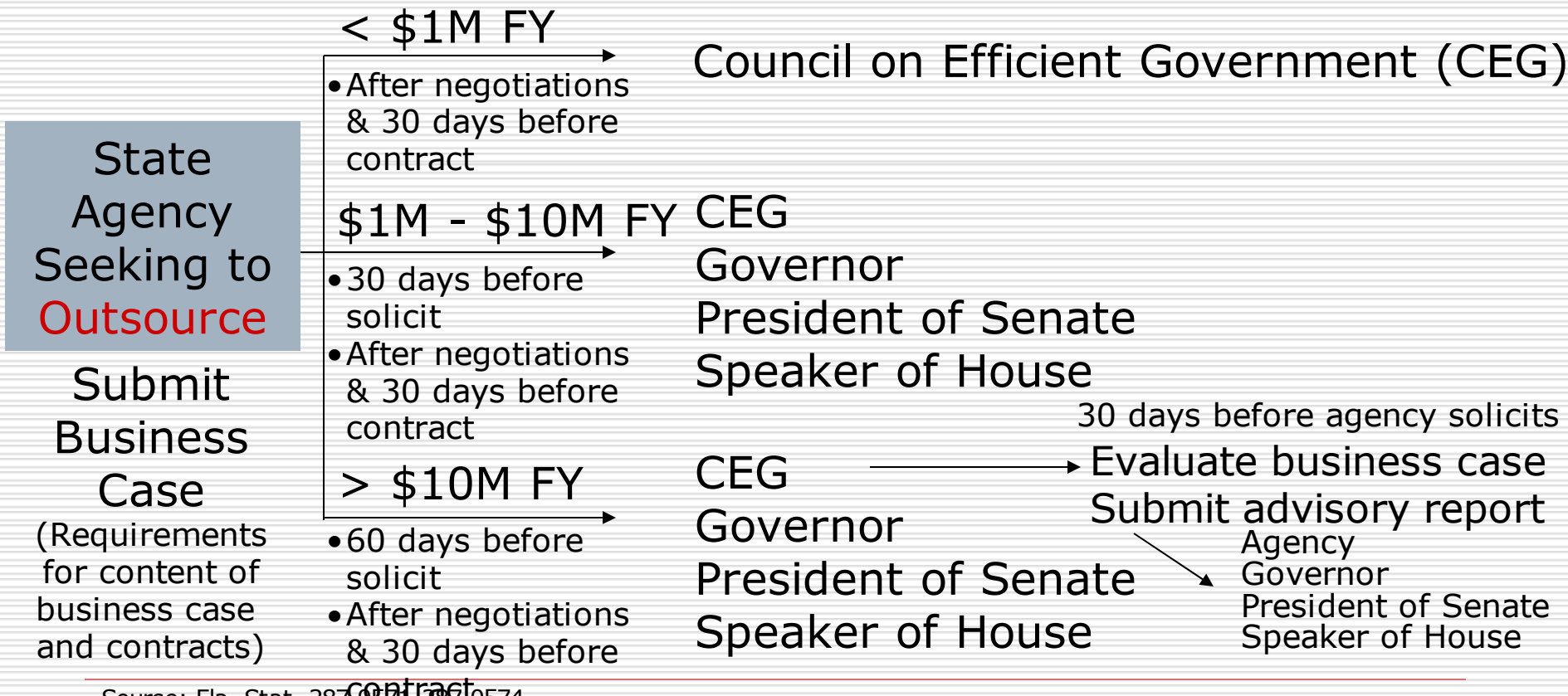
- ❑ Board/commission or agency
- ❑ State
- ❑ Conditions
- ❑ Cost analysis
- ❑ Enforcement
- ❑ Other



Florida
Oklahoma

Other 1: Require Review

Florida Efficient Government Act



Source: Fla. Stat. 287.0571-287.0574

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Other 1: Require Review

Florida Efficient Government Act

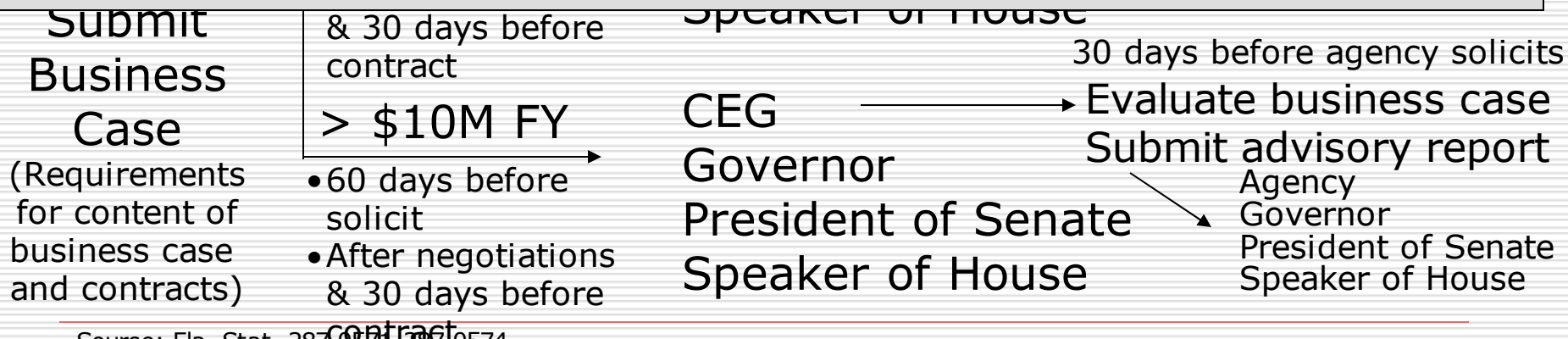
< \$1M FY

Council on Efficient Government (CEG)

Examples of other provisions include:

- Management Privatization Act creates a process for the agency to contract with nonprofit corporations to provide services for regulating professionals

Source: Fla. Stat. § 455.32 et seq.

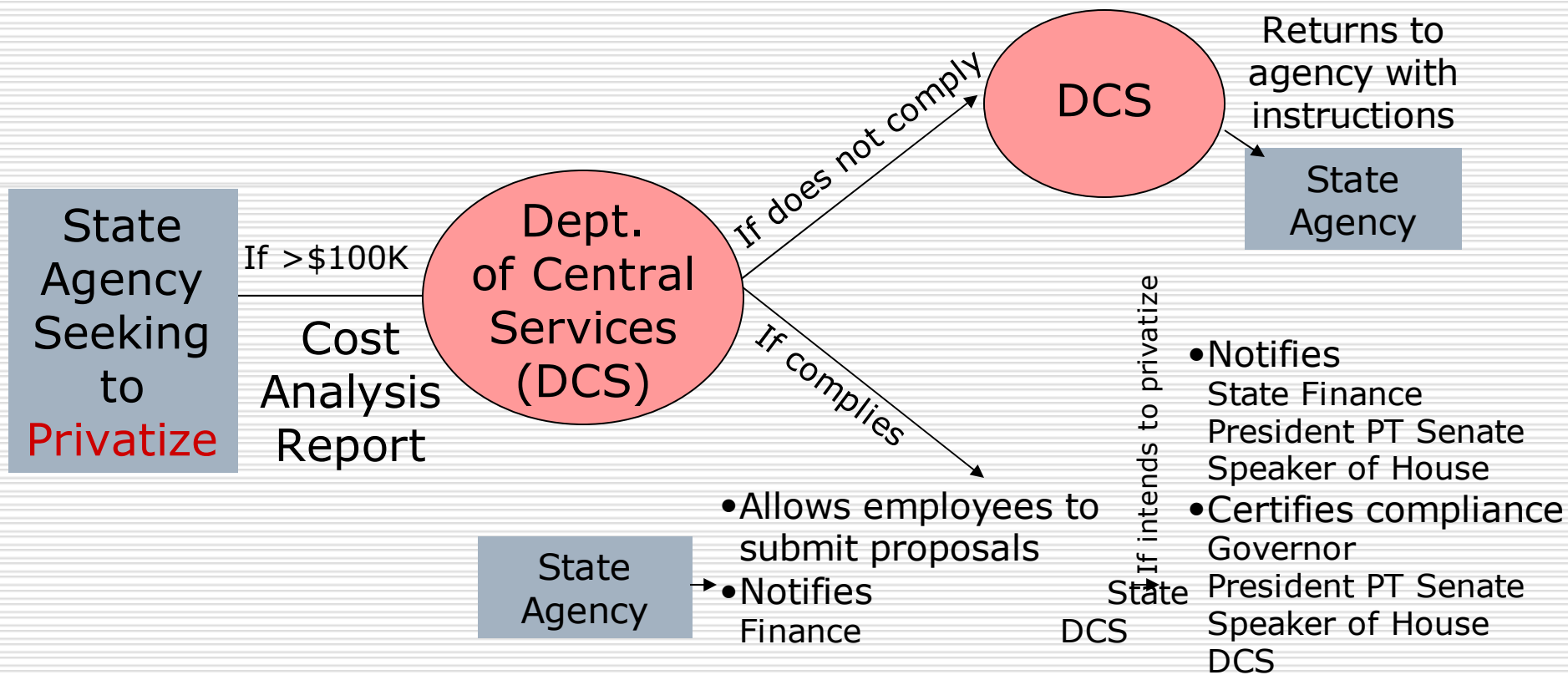


Source: Fla. Stat. 287.0571-287.0574

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Other 1: Require Review

Oklahoma Privatization of State Functions Act



Other 1: Require Review

Oklahoma Privatization of State Functions Act

Other requirements include those related to:

- Providing employees information
- Vendor requirements
- Written analysis of contract
- Returning function to state if contract cancelled
- Compensation being based on performance
- Requirements related to the contractor offering positions to agency employees
- Conflict of interest

Agency

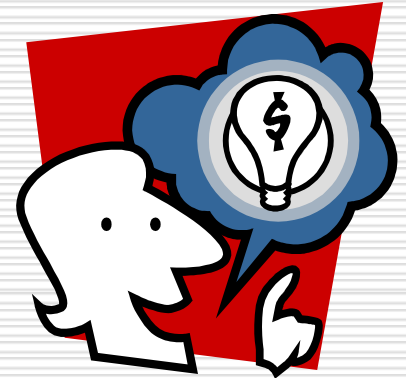
Finance
Services

Central

Speaker of House
Central Services

Other 2: Direct Action

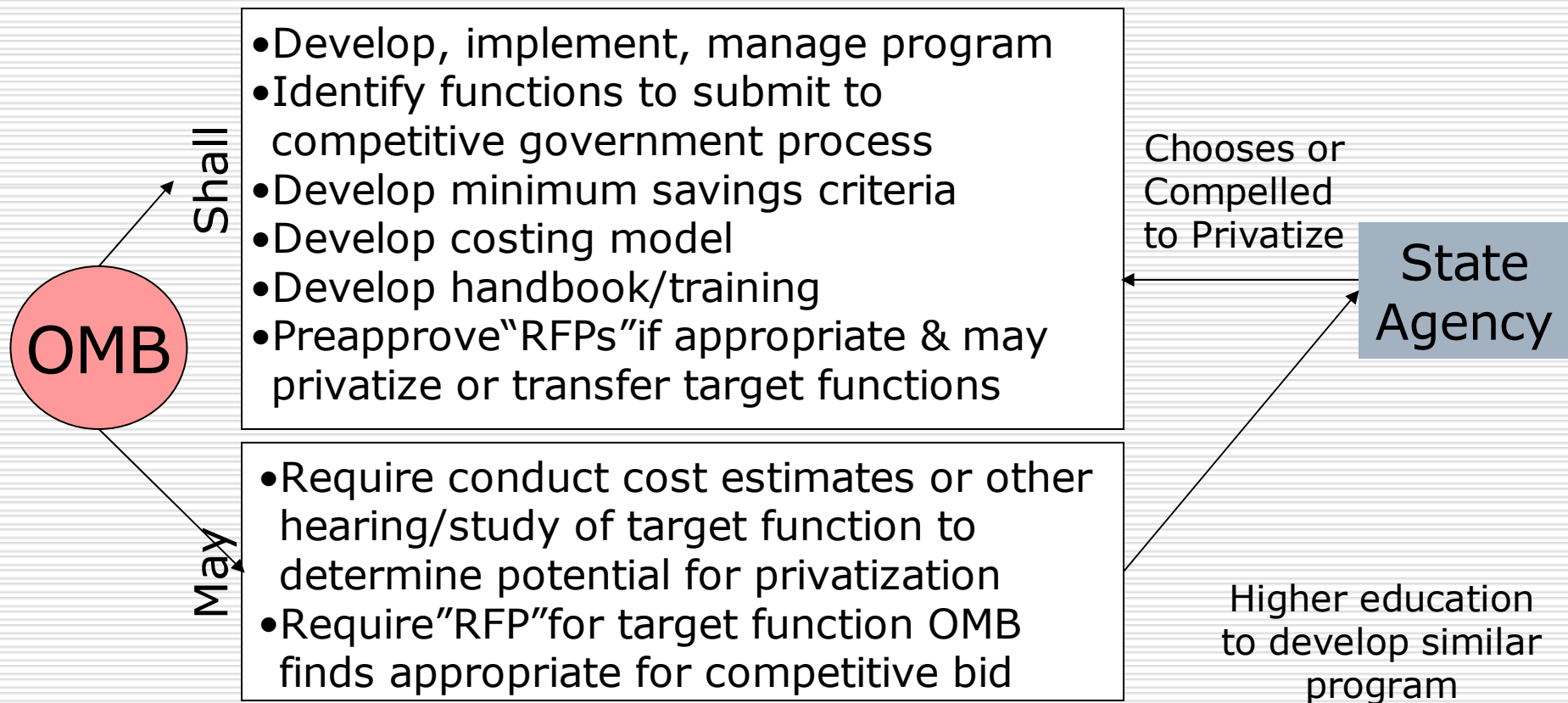
- ❑ Board\commission or agency
- ❑ Selection process
- ❑ Cost analysis
- ❑ Enforcement
- ❑ Other



Arizona
Texas
Virginia

Other 2: Direct Action

Arizona: Competitive Government Program



Source: A.R.S., Title 41, Chapter 25, Art. 2

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Other 2: Direct Action

Arizona: Competitive Government Program

- Develop, implement, manage program

• Identify functions to submit to

Examples of other provisions include:

- A general prohibition of state competition with private enterprise and complaint process for higher education (similar to CO)
- Annual reporting of privatization options or nontraditional regulatory approaches being considered by state agency

Sources: A.R.S. §§ 41-2751 et seq., 41-1021.02

- Require RFP for target function OMB finds appropriate for competitive bid

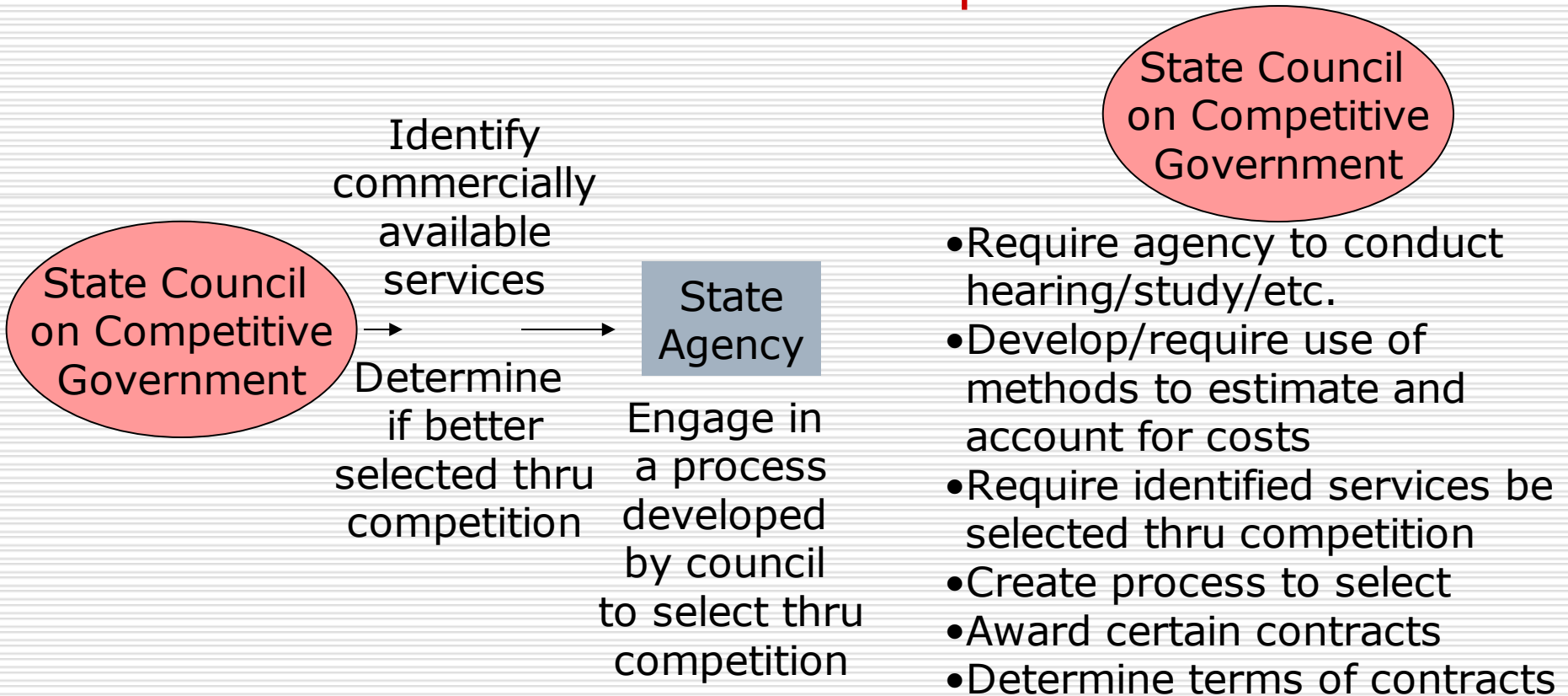
to develop similar program

Source: A.R.S., Title 41, Chapter 25, Art. 2

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Other 2: Direct Action

Texas: State Council on Competitive Government



Other 2: Direct Action

Texas: State Council on Competitive Government

Identify

State Council
on Competitive

Examples of additional issues include:

- A local government may voluntarily participate in a contract awarded under the act
- Legislative member subject to constitutional issue

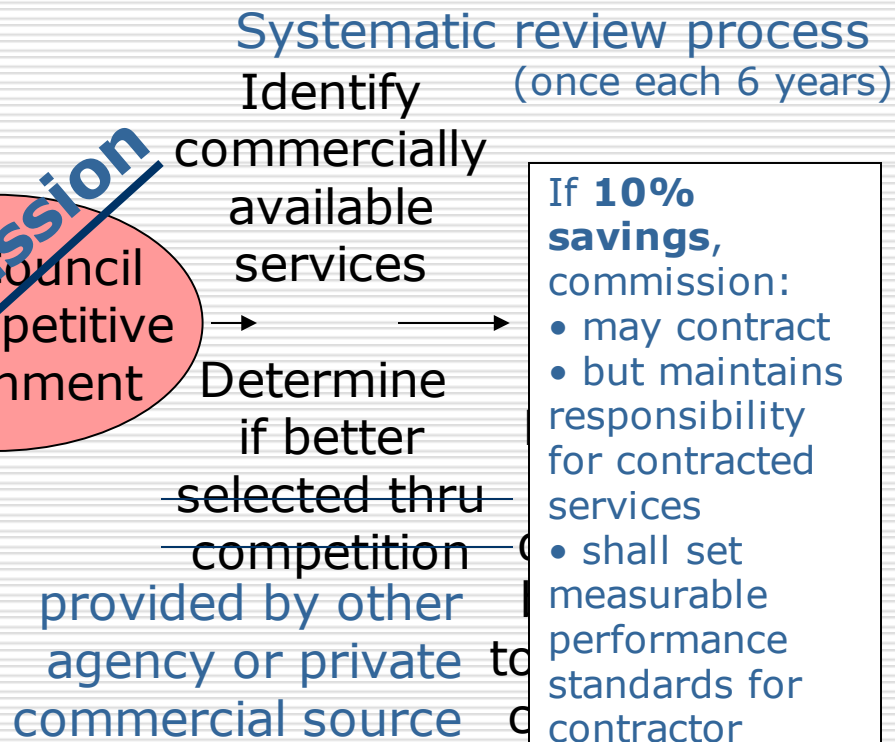
selected thru
competition developed
by council
to select thru
competition

- Require identified services be selected thru competition
- Create process to select
- Award certain contracts
- Determine terms of contracts

Other 2: Direct Action

*Texas Building
and Procurement
Commission*

Texas: ~~State Council on Competitive Government~~




Commission shall:

- determine if vendors exist
- compare costs of contracting from other state agency providers
- document savings

Commission shall consult with the Council as necessary

Other 2: Direct Action

Virginia: Multiple Players



Commonwealth
Competitive
Council



Department of
Planning and
Budget



Governor

- Advisory board
- Examine, promote, develop, encourage, establish, monitor, advocate, accelerate, determine, devise, review
- Develop commercial activities list
- Make services available to political subdivisions

- Unallot funding no longer needed because of privatization
- Ensure proper reporting requirements

- Examine at least 3 commercial activities every 2 years
- If outsourcing may result in reduced costs or a measurable benefit, use competitive process
- Use agencies to develop methodology, guidance, etc.
- Report state job elimination due to privatization

Other 3: Respond to Complaints

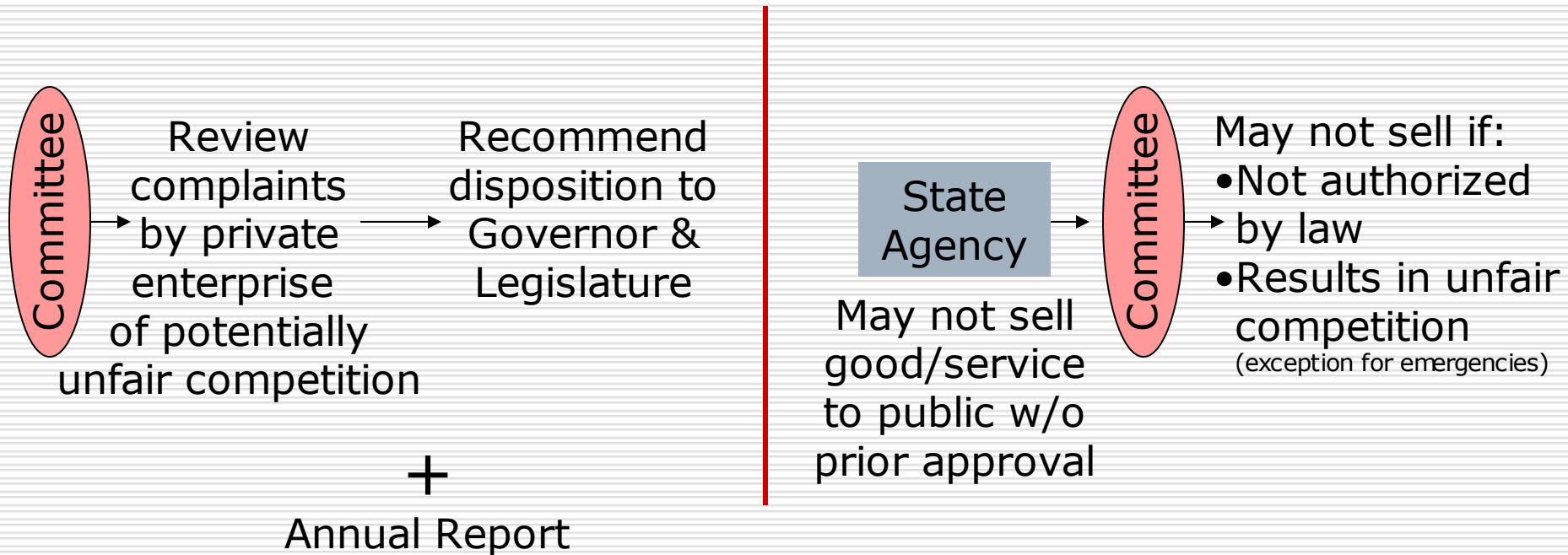
- ❑ Board/commission or agency
- ❑ Criteria
- ❑ Enforcement
- ❑ Other



Maine
Colorado

Other 3: Respond to Complaints

Maine: Advisory Committee on Fair Competition with Private Enterprise



Other 3: Respond to Complaints

Colorado: State Government Competition with Private Enterprise

“A state agency shall not engage in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services to the public which are also offered by private enterprise unless specifically authorized by law.”

Other 3: Respond to Complaints

Colorado: State Government Competition with Private Enterprise



- An institution of higher education is to adopt procedures for hearing complaints by privately owned businesses
- If a business complains of unfair competition by an institution of higher education, the business is to have an opportunity for a hearing
- The complaint is to be first heard by the CEO of the institution or a designee
- Appeals are to the governing board of the institution

Other 3: Respond to Complaints

Colorado: State Government Competition with

- A state agency that is provided goods or that provides goods to the public shall determine if the goods can also be provided by contract with private enterprise
- If contracting with private enterprise is more cost-effective, the state agency may contract for the goods in accordance with the procurement code

Sources: C.R.S. §§ 6-2-115.5

Institution or a designee

- Appeals are to the governing board of the institution

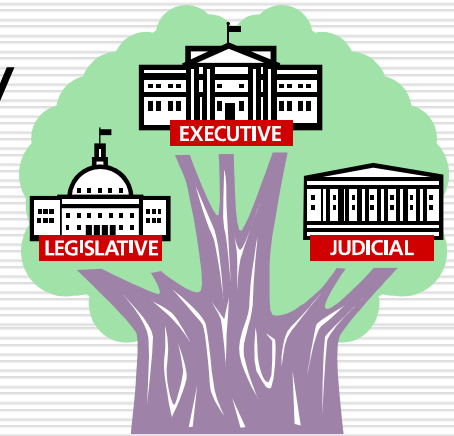
Source: C.R.S. 24-113-104, see also A.R.S. 41-27-53 (similar provision with timing requirements and other issues)
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Examples of Legal and Policy Issues

Separation of Powers

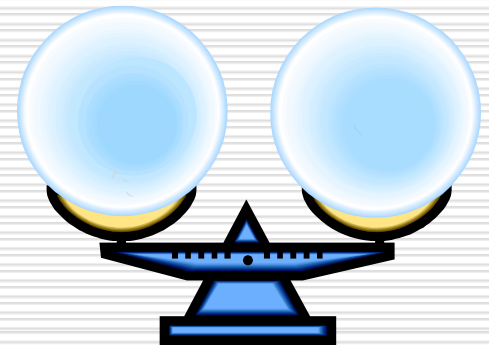
- ❑ Membership on non-advisory committees
- ❑ Enforcement authority

Political Subdivisions
Higher Education



Balance of Promotion/Protection

- ❑ More process, less flexibility for agencies
- ❑ Balance may be different:
 - Privatization
 - Government competition
- ❑ Enforcement



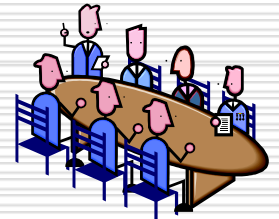
Political Subdivisions
Higher Education

Type of Entity to Monitor

- Board/commission or agency
 - Branch
 - Advisory or enforceable

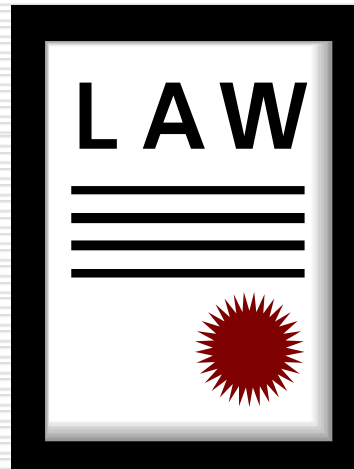


Political Subdivisions
Higher Education



Other issues

- Issues specific to a proposal



Questions?

